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COURT OF APPEALS  
STATE OF NEW YORK

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THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

-against-

NO. 3

JOHN WAKEFIELD,

Appellant.

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20 Eagle Street  
Albany, New York  
March 15, 2022

Before:

CHIEF JUDGE JANET DIFIORE  
ASSOCIATE JUDGE JENNY RIVERA  
ASSOCIATE JUDGE MICHAEL J. GARCIA  
ASSOCIATE JUDGE ROWAN D. WILSON  
ASSOCIATE JUDGE MADELINE SINGAS  
ASSOCIATE JUDGE ANTHONY CANNATARO  
ASSOCIATE JUDGE SHIRLEY TROUTMAN

Appearances:

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Official Court Transcriber



1 CHIEF JUDGE DIFIORE: Appeal number 3, The People  
2 of the State of New York v. John Wakefield.

3 We'll give counsel a few minutes to collect  
4 themselves and get organized.

5 Good afternoon, Counsel.

6 MR. HUG: Good afternoon, Your Honors. Matthew  
7 Hug for John Wakefield, the appellant in this matter. Your  
8 Honor, may I reserve two minutes for rebuttal?

9 CHIEF JUDGE DIFIORE: You may, sir.

10 MR. HUG: Your Honors, on two counts, the two pri  
11 - - - the two main counts in this - - - in this appeal  
12 relate to the abuse of discretion of the trial court in its  
13 Frye determination, as well as the confrontation issue that  
14 were raised in point two. I'm happy to answer questions  
15 with respect to either one. I don't know which is more to  
16 - - - to the court's liking, but I think both of them  
17 present very interesting issues for this court's  
18 consideration. And they - - - they - - - they - - - they  
19 leapfrog from your decisions in the Williams and Foster-Bey  
20 matter, and now you have one, where a Frye hearing was  
21 conducted, but without the source code. And I think that  
22 even if - - - even if - - -

23 JUDGE RIVERA: Counsel, if I can inter - - -  
24 interrupt you? I'm on the screen. Hello, good afternoon.  
25 Why don't you address, if you would, at this point, why the



1 defendant was entitled to the source code, when they've  
2 gotten everything else? Why do they need that to be able  
3 to proceed?

4 MR. HUG: Well, it's - - - that - - - that - - -  
5 there's a two-part answer to that, Your Honor. First, the  
6 defendant was entitled to the source code, both at the Frye  
7 hearing, as well as prior to trial, so that he could have  
8 an independent expert examine exactly what the declarant  
9 was going to be saying.

10 Now, secondly, the - - - the refusal by the  
11 progenitor of this software to release the software to the  
12 greater scientific community stands as an impediment to him  
13 establishing that it is also accepted by the greater  
14 scientific community. I think it's a truism to say that if  
15 the greater scientific community hasn't had a chance to  
16 look at a process, they can't be deemed to have accepted  
17 it.

18 JUDGE WILSON: It sounds like that's independent  
19 of - - - of the defendant's right to have a - - - the  
20 defendant may have no right, but you're still making an  
21 argument based on Frye that some measure of the scientific  
22 community has to have access.

23 MR. HUG: That's precisely right, Judge. I don't  
24 think that we need to limit it to, was the defendant  
25 entitled to it; I think he was, because who else is going



1 to cross-examine the declarant here? It wasn't going to be  
2 the prosecution. They showed no desire to investigate what  
3 they paid for. They paid for an answer, and they - - -  
4 they received it.

5 JUDGE CANNATARO: Counsel, is it - - - is it for  
6 lawyers and judges to say what the scientific community  
7 must have access to or should have access to, in order to,  
8 you know, approve of the methodology in question? Because  
9 there are studies out there on this very - - - you know, on  
10 the TrueAllele system that look upon it favorably. They  
11 said no - - - it - - - it doesn't seem as if the community,  
12 as a whole, is complaining about lack of access to source  
13 code.

14 MR. HUG: Well, first we got to look at what was  
15 the state of the science in 2014, not what the state of the  
16 science may be today. If we looked at it today, we would  
17 know that the New York State Police abandoned TrueAllele  
18 after a cheating scandal, because they couldn't get their  
19 own officers to even figure out what but - - - buttons to  
20 push.

21 But to - - - to - - - to address your question in  
22 the main, yeah, it is the job of lawyers and judges, as the  
23 only profession in this state that takes an oath to the  
24 Constitution and is entrusted with ensuring that what  
25 happens in our courtrooms is fair. And yes, we do have the



1 authority to say, before we allow something to come into  
2 one of those courtrooms, it's going to have general  
3 acceptance.

4 JUDGE GARCIA: But Counsel, to - - - to go back,  
5 then, to your original point, which is our standard of  
6 review is an abuse of discretion. So I think your point  
7 about acceptance in the scientific community and needing  
8 the code, that seems to me to fall within the heartland of  
9 the discretion of the trial judge. Now, we can say is it  
10 an abuse or not, but that's the standard we would be  
11 looking at.

12 Your other argument, your confrontation clause  
13 argument and your - - - they - - - their obligation to  
14 disclose it, that seems somewhat different, right?

15 MR. HUG: Yes. I think - - -

16 JUDGE GARCIA: So what would the standard be for  
17 that? I mean, we would have to decide whether under the  
18 Constitution, it - - - your client's entitled to this,  
19 right?

20 MR. HUG: Well, first, I think the Appellate  
21 Division appropriately reversed the lower court by finding  
22 that the TrueAllele program and its report was testimonial.  
23 So then the second question becomes, well, who is the  
24 declarant?

25 JUDGE GARCIA: But is there some confusion there



1 over whether it's the report or the code?

2 MR. HUG: No.

3 JUDGE GARCIA: Because certainly the report, yes.  
4 But the code isn't the report.

5 MR. HUG: Well, we don't know what the code is,  
6 so - - -

7 JUDGE GARCIA: It's an algorithm; let's assume  
8 that.

9 MR. HUG: It may - - - well, that's what he says  
10 it is. See, this is - - - this is the conundrum here.

11 JUDGE GARCIA: So what would you say it is?

12 MR. HUG: The declarant is - - - is - - - well,  
13 the declarant is akin to the analyst. So if an analyst  
14 according to this court's holdings in a string of DNA  
15 cases, the declarant must be the person that actually did  
16 the analysis. In this case, Dr. Perlin did not do the  
17 analysis. His computer - - -

18 JUDGE TROUTMAN: But he created the program.

19 MR. HUG: Well, right, he created the program - -  
20 - so he testified that he wrote the code. But much like  
21 Geppetto created Pinocchio, at some point, the horse is out  
22 of the barn. Does Dr. Perlin know what internal biases he  
23 had when he wrote that code? Is he an infallible code  
24 writer?

25 JUDGE CANNATARO: But couldn't he cross-examine -



1 - -

2 JUDGE TROUTMAN: But aren't those questions - - -

3 JUDGE CANNATARO: - - - Dr. Perlin on that?

4 Excuse me, Judge.

5 MR. HUG: No, it would have been severely  
6 hamstrung, because what are you going to cross-examine him  
7 on? He can say anything. He - - - he could - - -

8 JUDGE CANNATARO: Well, it's easier to cross-  
9 examine Dr. Perlin than it would be to pages and pages of  
10 code.

11 MR. HUG: Right. So it's a practical problem.  
12 It's not a constitutional problem. You've hit the nail on  
13 the head, Your Honor, because - - - and what the Appellate  
14 Division did and I think what the prosecution is trying to  
15 do, is to take a practical problem and make it into a legal  
16 problem.

17 Practically, what could have happened, which is  
18 what counsel wanted to do as he explained in his memorandum  
19 of law when he sought this information, was cross-  
20 examination of Dr. Perlin is - - - cannot be conducted  
21 without access to what his machine actually does, what code  
22 was written in there by him or his partner.

23 So yes, practically speaking, he would still be  
24 the vessel - - -

25 JUDGE TROUTMAN: So are you essentially arguing



1 that you're stuck with, because he said so, because you  
2 don't have the actual code - - -

3 MR. HUG: To a degree.

4 JUDGE TROUTMAN: - - - as to validity.

5 MR. HUG: To a degree, and I think that's what  
6 Judge Pritzker was getting at when he wrote the decision to  
7 say that we are in, like this brave new world here, where  
8 we have a combination of machine and - - - and human. And  
9 - - - and the only practical means that we can do right now  
10 is to question Dr. Perlin with - - - armed with his source  
11 code may be after - - -

12 JUDGE RIVERA: Wait, Counsel, if I can interrupt  
13 you? Then - - - then why isn't that - - - I - - - I - - -  
14 I don't understand what you're saying, that's not a  
15 constitutional issue. Isn't the point - - - I thought the  
16 point you were making was without the source code, it's - -  
17 - it is not enough. You cannot have an effective cross-  
18 examination. You don't have the information that you need  
19 to ask the questions.

20 MR. HUG: That's exactly what I'm saying, Judge,  
21 and what I'm saying is, is that the prosecution and the  
22 court made a practical problem, a practical question, of,  
23 well, who are going to - - - you can't question the  
24 computer. I understand you can't question the computer.  
25 But you can question the - - - the person that's in front





1 of you with the computer's - - -

2 JUDGE RIVERA: I understand. All I'm saying is  
3 that what you - - - you continue to say is the practical  
4 problem, because there's a computer. It's not a human  
5 being. They're not going to be responding. Nevertheless,  
6 that devolves to a constitutional issue. When we think of  
7 it in legal terms, it's a constitutional issue that you're  
8 arguing, is it not?

9 MR. HUG: Yes, it is.

10 JUDGE SINGAS: Counsel, what are you arguing  
11 under the confrontation clause? That the codes are the  
12 declarant, or that the codes should have been used to  
13 assist in cross-examination?

14 MR. HUG: Well, that's for the court to decide.  
15 I would argue, first and foremost, that the code itself is  
16 the declarant, and that - - -

17 JUDGE SINGAS: But the - - - but the code doesn't  
18 analyze the data, right? I mean, the code - - - a human  
19 has to put in the data, set the parameters, run the  
20 calculations, interpret the results. There's several steps  
21 between computer and result. Would you agree?

22 MR. HUG: I disagree, Your Honor. I think that  
23 the testimony from Dr. Perlin said it all. He's testified  
24 that my system is an expert system. It "proposes  
25 possibilities". It "thinks". It "hypothesizes". It



1 "draws inferences". It "solves the problem". And then  
2 asked what does the analyst do, and he says, that the  
3 analyst asks TA, TrueAllele, to solve everything, presses a  
4 button, and it solves everything. The analyst does  
5 nothing.

6 The analyst in this case, if it had been the  
7 state police who couldn't do it - - - remember, the  
8 district attorney hired Dr. Perlin personally, because the  
9 state police couldn't figure out after five years how to  
10 press these buttons. So Dr. Perlin's computer solved  
11 everything. He testified to it himself. He called the - -  
12 -

13 JUDGE SINGAS: So why isn't sufficient just to  
14 cross-examine Dr. Perlin, who created the program?

15 MR. HUG: Because Dr. Perlin didn't do the  
16 analysis of the - - - of the DNA result. The computer did,  
17 based upon biases, or whatever else is written in that  
18 170,000 lines of code. That is the - - - the crux of the  
19 issue, is that Dr. Perlin is not the declarant by himself.  
20 He is the declarant with his creation. And without having  
21 both together, you can't - - -

22 JUDGE RIVERA: So Counsel, can I just confirm?  
23 Although at the time, since you're saying we look at the  
24 science at the time - - - although at the time, Dr. Perlin  
25 was unwilling to turn over the source code, based on his



1           proprietary claim, he has indicated since then that he  
2           would or has. Is that not correct?

3                       MR. HUG: I - - - I mean, it's outside the  
4           record. I don't know what he's currently claiming as, you  
5           know, as a business practice. But I don't - - -

6                       JUDGE RIVERA: I thought there were cases to that  
7           effect. I'm not asking for a statement - - -

8                       MR. HUG: Oh. I thought - - -

9                       JUDGE RIVERA: - - - that otherwise would not be  
10          in the public domain.

11                      MR. HUG: Assuming that he is, it's of no moment  
12          to this case, because if this court finds that it was an  
13          abuse of discretion to admit this evidence, that it - - -  
14          that evidence is excised, and without that evidence, this  
15          is - - - this must - - - must be reversed and dismissed.  
16          There is not sufficient - - -

17                      JUDGE WILSON: Well, that's - - - that's what I  
18          wanted - - - sorry, over here - - - that's what I wanted to  
19          turn you to, actually, is harmless error again. So  
20          focusing just on the TrueAllele evidence, if we - - - if we  
21          side with you there - - -

22                      MR. HUG: Yup.

23                      JUDGE WILSON: - - - it seems to me there's still  
24          an awful lot of other evidence in - - - inculcating Mr.  
25          Wakefield. Do you want to address why this is not



1 harmless?

2 MR. HUG: I would like to, yes. First, I don't  
3 think we get to harmless err - - - error analysis at all,  
4 because there's not overwhelming evidence of guilt. Until  
5 you get to overwhelming evidence of guilt, you don't touch  
6 harmless error. Assuming that you do find overwhelming  
7 evidence, I would push back on that and say, the  
8 prosecution paid a king's ransom to get this evidence in,  
9 and they wouldn't have done so if they thought that they  
10 didn't need it.

11 Number two, the jailhouse informant says - - -  
12 the primary testimony here, after being promised, you know,  
13 immediate releases. These people are being shown  
14 photographs, single photographs, of the defendant, and then  
15 shown photo arrays. You've got a, you know, a drug addict  
16 that - - - that takes a reward - - -

17 JUDGE RIVERA: But - - - but Counsel, wasn't  
18 there also other DNA evidence - - - not the one that went  
19 through the TrueAllele process, or have I misunderstood the  
20 record that - - - and that other evidence connects him to -  
21 - - to the crime.

22 MR. HUG: The other DNA evidence run through the  
23 stochastic method by the New York State Police Forensic  
24 Investigation Center? There was a witness that testified,  
25 but no, those - - - those results are so meaningless, it's



1 like - - - one of them was like 1-in-400 chance. I mean,  
2 these - - - these likelihood ratios were far too low.

3 So no, there is no direct - - - direct evidence,  
4 Your Honor, of the defendant's guilt. There was no  
5 eyewitnesses. There's no confession. There's no  
6 admission. There is nothing tying him to this, except for  
7 a series of ne'er-do-wells in the - - - in the county that  
8 were more than willing to abide by offers made by the  
9 district attorney's office to get them to testify.

10 CHIEF JUDGE DIFIORE: Thank you, Counsel.  
11 Counsel?

12 MR. WILLIS: Good afternoon, Your Honor. Thank  
13 you very much. Peter Willis for the Schenectady County  
14 District Attorney's Office. I've been listening,  
15 obviously, to the arguments in the original case and - - -  
16 and Mr. Hug here today. I want to push back on the phrase  
17 that is being used, the black box here. That could not be  
18 further from the truth, as respect to TrueAllele.

19 The record of the Frye hearing contains seven  
20 different validation studies, other studies that are  
21 performed - - -

22 JUDGE TROUTMAN: Does it matter that six of the  
23 seven, Dr. Perlin was involved in, and the seventh, he was  
24 an advisor?

25 MR. WILLIS: I don't believe he was an advisor,



1 but Your Honor, I - - - I don't think it - - - it matters  
2 in terms of invalidating those studies. They're performed  
3 in conjunction with other forensic laboratories in the  
4 state. To suggest that Dr. Perlin, because he works - - -

5 JUDGE RIVERA: But Counsel, isn't - - - isn't the  
6 point that they're not, then, in that sense, fully  
7 independent, right? That - - - that there is at least one  
8 individual who clearly has a conflict.

9 MR. WILLIS: I - - - I agree, and - - - and - - -  
10 but for the record, there are - - - there are two studies  
11 provided by Jay Caponera, working at the New York State  
12 Police Forensic Investigation Center, who testified, I did  
13 these studies completely independent of Dr. Perlin. Also  
14 submitted into the record at the hearing was a study  
15 performed by the forensic science division in - - - in the  
16 State of Virginia, who also performed valid - - -

17 JUDGE TROUTMAN: Does it matter that they had  
18 purchased the program and had arguably an interest in it  
19 being deemed valid?

20 MR. WILLIS: Whether they had an int - - - I  
21 think that the way they're going to have to do it is if  
22 they're going to try to use this system in general, to  
23 adopt as their course - - - as their casework system,  
24 whether they paid for it or not, I don't think informs  
25 their decision whether they're going to essentially rig



1 their data to - - -

2 JUDGE TROUTMAN: So your argument is, it doesn't  
3 matter that you may have an interest in it being validated,  
4 as long as there is evidence of validation?

5 MR. WILLIS: I think if there is evidence of  
6 validation, absolutely. I think that if it - - - if it - -  
7 - if you want to suggest that the forensic scientists who  
8 are using this system are somehow unethically creating  
9 validation studies, I wouldn't - - -

10 JUDGE TROUTMAN: No, it's - - - it's not a  
11 question of unethically. Wouldn't it be better when you're  
12 talking about science? Often people don't realize they  
13 have biases. Science is supposed to be different. And  
14 having someone who was involved in making it, it - - - it  
15 does cause it - - - it does cause questions or concerns,  
16 especially when you're talking about somebody's liberty.

17 MR. WILLIS: Right. And well, that's why the  
18 studies from Virginia and Jay Caponera are - - - are - - -  
19 are specifically valuable to deciding this issue.

20 JUDGE WILSON: So valid - - - valid - - -

21 MR. WILLIS: They are not paid for these studies.  
22 They were engaging in these studies in order to obtain  
23 certification, to be able to use this program in casework.  
24 That's what Jay Caponera testified to. That these were the  
25 type of studies you would use to become certified to allow



1 the output to be used in connection with the FBI  
2 laboratory, with CODIS, and to be - - - to obtain national  
3 certification.

4 JUDGE WILSON: So validation seems a little off  
5 topic. It seems more like a Daubert issue than a Frye  
6 issue, and some of the People's own exhibits, 25 and 26 in  
7 particular, I think, say things like implementation of this  
8 has lagged. It's unfamiliar to many DNA scientists. So  
9 validation is not irrelevant, but it seems to me your  
10 burden is to show general acceptance in the scientific  
11 community.

12 MR. WILLIS: I would agree, Your Honor. And - -  
13 - and I think the Frye hearing did that. There - - - there  
14 has to be a first. That's what the Wesley case taught us  
15 about DNA. One of the only cell - - - Cellmark, the only  
16 real lab in the country back in the '80s who was doing that  
17 DNA work, performed the analysis in that case, brought it  
18 in front of this court, and it was approved of. Sort of  
19 the same thing here.

20 JUDGE TROUTMAN: But general acceptance in the  
21 scientific community doesn't involve people outside of the  
22 process doing that accept - - - doing the testing of it, to  
23 make that determination.

24 MR. WILLIS: I'm - - - I'm not sure I follow Your  
25 Honor's question.





1 JUDGE TROUTMAN: Are - - - are you saying that  
2 the dif - - - scientific community can, in fact, include  
3 Perlin and others who bought the program?

4 MR. WILLIS: Can they in - - - can it include  
5 those members of the community?

6 JUDGE TROUTMAN: Those are the - - - those are  
7 the community that made the decisions here.

8 MR. WILLIS: Well, I - - - I would agree they're  
9 part of the scientific community, but - - - but that wasn't  
10 the only community that we presented evidence of. As  
11 Justice Wilson just referenced, those articles written  
12 about TrueAllele are uniformly - - - and were referenced -  
13 - - are uniformly positive in their remarks on how the  
14 system analyzes DNA evidence. The leading creators of  
15 other competing DNA analysis programs - - -

16 JUDGE TROUTMAN: There - - - there is no question  
17 that they were positive. The concern is who was involved  
18 in those studies.

19 MR. WILLIS: I agree. That even - - - but just  
20 because Cybergenetics is involved in this study does not  
21 invalidate the study. And - - -

22 JUDGE CANNATARO: To put it another way - - -

23 JUDGE RIVERA: But - - - but isn't - - - isn't a  
24 core principle in science that you don't have those who  
25 might have a conflict. That - - - it's not about ethics.



1 But those who might have a particular conflict, or who have  
2 a proprietary interest, should not be part of the process  
3 that's assessing and evaluating the system, or the  
4 methodology, or the program, or the algorithm, or whatever  
5 it is. I mean, it - - - it's a core principle of science.

6 MR. WILLIS: I - - - I - - - I would disagree  
7 with that, Your Honor. I don't believe that's backed up,  
8 one, by this court's decision in Wesley, again, where the  
9 studies concerning DNA analyses were performed by the very  
10 same laboratory that ended up analyzing the DNA evidence in  
11 that case.

12 But also in general, a pioneering scientific  
13 process is most naturally going to be worked upon and  
14 validated by those people that are most closely assembled  
15 with it. But that's also the reason why the DNA  
16 Subcommittee for New York State spent three years assessing  
17 these presentations from TrueAllele in connection with the  
18 New York State Police Forensic Investigation Center, to  
19 determine whether or not this was an appropriate type of  
20 analysis to be used in New York State.

21 JUDGE RIVERA: Counsel, can you address - - - I'm  
22 sorry, can - - - can you just go through the harmlessness  
23 analysis, please?

24 MR. WILLIS: Yes, Your Honor. So in this case,  
25 in addition to the TrueAllele evidence, which even if you



1 move that aside, there was testimony from Andrea Lester  
2 from the New York State Police Forensic Investigation  
3 Center, the original analyst on the case. She connected  
4 the DNA on a scrape from the - - - the victim's forearm, as  
5 well as a mixed sample from the rear of his shirt collar.  
6 And remember, this is a victim who is found strangled to  
7 death with a guitar cord that was ostensibly wrapped around  
8 his neck by the person who was killing him from behind. So  
9 the evidence of the defendant's DNA on the rear of his  
10 shirt collar was particularly incriminating.

11 That was combined with the fact that the  
12 defendant admitted the murder to three different people,  
13 one of whom, the record shows, Robert Evans, testified to  
14 an interaction that could have only happened in about a  
15 three-day span, when the defendant had been released from  
16 the local jail. He was out for about three days, during  
17 which time, the defendant was - - - the victim was killed.

18 His - - - Mr. Wakefield's DNA also shows up on  
19 bottles in the victim's apartment from a party that  
20 occurred during that three-day period. And Robert Evans  
21 encounters him a couple of blocks away from the residence,  
22 where he admits the murder. He says he wants to go back to  
23 the scene, to steal more of his items. That is  
24 particularly powerful and incriminating evidence, in and  
25 aside from the other DNA evidence.



1           Additionally, the defendant's seen on the street,  
2           trying to sell electronics, that match up with the items  
3           that are taken from the def - - - from the victim's house,  
4           as well as holding a bag that was, according to the  
5           witness, who testified was the same one that the victim is  
6           shown in a picture with, from a family trip from several  
7           years prior.

8           So even if the TrueAllele evidence is excised  
9           from the case, which I assume that it ought not to be under  
10          any circumstance, the evidence here of guilt is still  
11          overwhelming in this instance.

12          I'd also submit that the defendant's argument  
13          that he's raising here, that the source code ought to have  
14          been released as part of a Frye hearing, was not made to  
15          the trial court. The trial court was never asked about  
16          that issue. It was never said. There was no testimony at  
17          the Frye hearing from anyone that said source code review  
18          is part of the scientific community's review of new and  
19          emerging DNA technology.

20          In fact, and I know it comes after the Frye  
21          hearing, we quote the International Society of Forensic  
22          Geneticists, who say source code review is not meaningful  
23          in a Frye context. And these are - - - that's an organ - -  
24          - an international organization made up of forensic  
25          geneticists, including members of the National Institute of



1 Standards, at the time.

2 I would submit that there is - - - the record in  
3 this case is clear. TrueAllele more than passed the Frye  
4 standard in this case, regardless of whether or not Dr.  
5 Perlin was involved in some of the studies.

6 CHIEF JUDGE DIFIORE: Thank you, Counsel.

7 MR. WILLIS: Thank you very much.

8 CHIEF JUDGE DIFIORE: Counsel, your rebuttal?

9 MR. HUG: Yes, just to put a fine point on  
10 preservation. Of - - - of course, counsel's arguments lack  
11 merit with respect to preservation. I'd point to Appellate  
12 Appendix 277 through 295, where there's lengthy questioning  
13 of Perlin about black box technology and whether or not it  
14 can be ever accepted. I would point out at record page 489  
15 in defendant's memorandum of law, following the hearing.  
16 The entire point of the - - - of his argument was that  
17 there can be no acceptance generally in the scientific  
18 community when the source code is being hidden from view.  
19 I would push back on the harmless error situation  
20 that - - - that counsel brings up. When you - - - you  
21 cannot unhear one-gazillion-in-one chance that it's the  
22 defendant and no one else. Perlin's testimony, if it  
23 shouldn't have been heard, cannot be deemed harmless,  
24 because the numbers are so cartoonishly huge, that Andrea  
25 Lester's testimony would've drowned in it.



1                   With respect to the Frye hearing and the  
2 validation studies, I think Your Honors are exactly right.  
3 There is deep concern, and should be, that the person that  
4 is peddling the technology and making a substantial fortune  
5 from it should not be the one that we entrust to decide  
6 whether it works.

7                   You don't need to look any further than the news  
8 earlier this year, with Elizabeth Holmes and Theranos. She  
9 pulled such a scheme where she told everyone that her  
10 product worked, one drop of blood. Another miracle  
11 product, one drop of blood will tell you if you have any  
12 genetic defect, such that you could get immediate medical  
13 attention. Well, she was able to pass her validation  
14 studies off on sophisticated venture capitalists and make  
15 billions of dollars, only to have it all collapse, because  
16 when somebody did get a look at what she was doing, it was  
17 - - - it was a smoke and mirrors, and - - - and - - - and  
18 this is the concern.

19                   I am not saying that Dr. Perlin is a bad actor.  
20 I'm saying that we don't know if he is, and as a result,  
21 Mr. Wakefield should not be wondering if he is - - -

22                   JUDGE GARCIA: Counsel, isn't - - -

23                   MR. HUG: - - - as he serves life in prison.

24                   JUDGE GARCIA: - - - isn't the point of Judge  
25 Kaye's concurrence in Wesley about this type of issue that



1           you need to be cautious here? And to me, again, that goes  
2           to the heartland of why we have a hearing. Trial judge  
3           hears this. Trial judge is well aware of these potential  
4           influences on the testimony of these various experts,  
5           either because they bought the software or because they had  
6           some involvement in developing the software. And why isn't  
7           that entrusted - - - the decision of how much weight, how  
8           cautious we should be in assessing those studies - - - why  
9           isn't that entrusted to the trial judge, under an abuse of  
10          discretion standard?

11                       MR. HUG: Well, because that's why we have review  
12          now, Your Honor, because - - -

13                       JUDGE GARCIA: Under an abuse of discretion  
14          standard?

15                       MR. HUG: Right. I don't think - - - I don't see  
16          how it cannot be an abuse of discretion to say that  
17          something exists when we don't get to look to see for  
18          ourselves.

19                       JUDGE GARCIA: But I think what you're saying,  
20          though, is because of these - - - the interest, and they're  
21          varied and different here, that as a matter of law makes  
22          this an abuse of discretion.

23                       MR. HUG: I would agree with that prop - - -  
24          proposition, Judge.

25                       CHIEF JUDGE DIFIORE: Thank you, Counsel.



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(Court is adjourned)

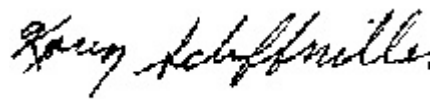




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C E R T I F I C A T I O N

I, Karen Schiffmiller, certify that the foregoing transcript of proceedings in the Court of Appeals of The People of the State of New York v. John Wakefield, No. 3 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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